I also hold that on the execution of the said agreement and the passing of the title deed and possession of the said land to the plaintiff, Mek became in equity a trustee for the plaintiff as soon as the purchase price had been paid. The principle applies also in jurisdictions where there is registrable title. (Per Suffian F.J. (as he then was) in *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad*[4]). Subsequently on Mek's death when the defendant was appointed administratrix of the estate she too became a trustee for the plaintiff.

Accordingly I give judgment for the plaintiff with costs. I order specific performance of the said agreement in that a proper transfer be made and to have the title to the land registered in the plaintiff's name as the legal owner and in default the Assistant Registrar be empowered to execute the transfer. Since the defendant had paid the sum of $22 for the share of the Baitulmal, I order the plaintiff to refund the sum to the defendant forthwith. I also order the plaintiff to pay all the expenses incurred by the defendant in taking out letters of administration, the account thereof to be submitted to the Assistant Registrar for the purpose of determining the amount.

I do not consider the plaintiff is entitled to damages.

The defendant's counterclaim is dismissed with costs.

*Order accordingly.*

Solicitors: *Jayadeva & Zahir; A. S. C. Hoe.*

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## WEE BING PO v. DAYANG ANAK NGIPA

**[O.C.J. (Tan Chiaw Thong J.) January 18, 1974]**
**[Sibu — Civil Suit No. 9 of 1973]**

*Practice and Procedure — Res judicata — Cause of action estoppel — Previous judgment — Same memorandum of sublease — Payment of monies — Meaning of expression "cause of action" — Further and other relief — Identity of suits — Whether action frivolous or vexatious.*

This was the second action between the parties. An earlier action between them was founded on the breach of a purported memorandum of sublease. The defendant in this second action alleged that (1) the plaintiff was basing his present action on the same cause of action as that in the earlier one and that since particularly a prayer was included in the earlier action for "further or other relief" and the earlier judgment made no order thereon, that judgment having been made in respect of the same cause of action, the plaintiff was estopped from bringing the present action, (2) the present claim fell within the residual prayer made in the earlier action and what the plaintiff should have done was to appeal against the earlier judgment, (3) further the same issue relating to the monthly payments was raised and disposed of in the earlier action, and because of the earlier judgment, the plaintiff was estopped from raising the same issue again.

The same memorandum of sublease was also pleaded in the second action.

**Held:** (1) the court in circumstances such as these will look at the pleadings in both actions and the judgment in the earlier action;

(2) the cause of action in the second action arose when the earlier court decided that the memorandum of sublease was null and void. The claim was founded on a total failure of consideration from the defendant and the claim was for the recovery of money had and received by the defendant. The cause of action in each of the two actions was distinct and not the same;

(3) the residual relief namely "further or other relief" prayed for in the earlier action had reference to the main reliefs asked for and could not have reference to the present cause of action;

(4) the evidence required to support the second action was different from that raised in the earlier action, and there was therefore no identity of suits. The action was therefore not frivolous or vexatious and an abuse of the process of court.

*Cases referred to:-*

(1) *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb* [1966] 1 Q.B. 630, 640.
(2) *Ball* v. *Holmes* [1956] 1 W.L.R. 1359, 1366.
(3) *Lee Sem Yoong* v. *Leong Yoong* [1967] 2 M.L.J. 86, 88.
(4) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.
(5) *Derrick* v. *Williams* [1939] 2 All E.R. 559, 566.
(6) *In re May* (1885) 28 Ch. D. 516.
(7) *Henderson* v. *Henderson* (1843) Hare 100, 115; 67 E.R. 319.
(8) *Brunsden* v. *Humphrey* (1884) 14 Q.B.D. 141, 146.
(9) *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255.
(10) *Public Trustee* v. *Kenward* [1967] 1 W.L.R. 1062.
(11) *Hunter* v. *Steward* (1861) 4 De G.F. & J. 168, 178.

CIVIL SUIT.

*David Tiong* for the plaintiff.

*Ting Tung Ming* for the defendant.

**Tan Chiaw Thong J.:** As a preliminary point, the defendant has raised the objection that the plaintiff is estopped from taking these proceedings on the ground of the operation of the doctrine of *res judicata.* The plaintiff does not object to this matter being tried as a preliminary issue.

This point has been pleaded as an alternative defence by the defendant in paragraphs 19 and 20 of the defence, which read as follows: —

"(19) Alternatively, the defendant contends and will contend at the trial of this action that the plaintiff is on the doctrine of *res judicata* estopped from claiming for a judgment against the defendant for payment of the sum of $3,240.00 or any other relief.

*Particulars*

In Civil Suit No. 48 of 1971 brought by the plaintiff against the present defendant and Ajah anak Rawan (f) based on the same cause of action which was tried on 15th June, 1972 the Honourable Mr. Justice George K.S. Seah dismissed the plaintiff's claim for specific performance or any other relief.

(20) The defendant contends that the plaintiff's claim is misconceived and should be dismissed with costs to the defendant." (See also paragraphs 15 and 16 of that defence).

The defendant pleads that, because in the judgment in Civil Suit No. 48 of 1971 between the present plaintiff and the present defendant and one Ajah anak Rawan (f), the plaintiff is prevented by the doctrine of *res judicata* from bringing another action based on the same cause of action. In other words, the defendant is pleading "cause of action estoppel" in this case. As Denning M.R. put it in *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb*[1] at page 640: " . . . if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause . . ."

In Civil Suit No. 48 of 1971, the plaintiff's respective claims against both defendants were based on the same cause of action.

In considering whether the doctrine of *res judicata* applies to the present action, it is not only permissible to look at the pleadings in the earlier action for the purposes of comparison: *Ball* v. *Holmes*[2] at page 1366, but also the judgment of the earlier action to see what it decided: *Lee Sem Yoong* v. *Leong Yoong*[3] at page 88.

The following are agreed facts applicable to both actions: —

(a) The same memorandum of sublease has been pleaded.

(b) Pursuant to the said memorandum of sublease, monthly payments of $120 have been made to the defendant by the plaintiff.

(c) The plaintiff was not given vacant possession of the shophouse the subject matter of the said memorandum of sublease.

Counsel for the defendant submitted that, on a comparison of the statements of claim in both actions, the plaintiff was basing his claim in the present action on the same cause of action as that in the earlier one, and that, since particularly a prayer was included in the earlier action for "further or other relief", and the earlier judgment made no order thereon, that judgment, having been made in respect of the same cause of action, the plaintiff is estopped from bringing the present action. In other words, the present claim fell within the residual prayer made in the earlier action and what the plaintiff should have done was to appeal against the earlier judgment, if he considered that his present claim should have been met in the earlier action and dealt with in the earlier judgment. Further, the same issue relating to the above monthly payments was raised and disposed of in the earlier action, and because of the earlier judgment, the plaintiff was estopped from raising the same issue again.

In this case, since the objection of the defendant proceeds on the basis that the cause of action in the two actions are the same, with which contention the plaintiff does not agree, this basic issue calls for determination, and for this purpose, the court will look at the pleadings in both actions and the judgment in the earlier action. If, having examined and considered them and the relevant legal principles applicable, the court comes to the conclusion that both actions are based on the same cause of action, then I think that the objection of the defendant succeeds.

First of all, what is a "cause of action". In his judgment in the case of *Nasri* v. *Mesah*,[4] with which judgment the other members of the Federal Court agreed, Gill F.J. (at page 34) said: —

"A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (*per* Lord Esher M.R. in *Read* v. *Brown* (1889) 22 Q.B.D. 128, 131).... In *Board of Trade* v. *Cayzer, Irvine & Co.* [1927] A.C. 610, 627, Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach...."

From a perusal of the statement of claim in the earlier action, it is clear that the cause of action there was founded on the breach of the purported memorandum of sublease, which was a form of contract between the plaintiff and the defendant and the second defendant in that action. Can it be said that in the present action, the cause of action is the same? In this connection, what in my view calls for consideration is whether the second proceeding involves a new cause of action or whether it is merely an attempt to recover, on the original cause of action, under some heading of damage not previously invoked. As Finlay L.J. said in the case of *Derrick* v. *Williams*[5] at page 566:

"For a separate action or a re-opening of the former action — it matters not which may be pursued in respect of that head of damage — *the essential distinction, which is a perfectly obvious one, is between a distinct cause of action and some head of damage*" (italics added).

Admittedly, the same memorandum of sublease has been pleaded in the statement of claim in the present action, but I do not think that it can be said that the cause of action here is founded on a breach of that memorandum of sublease, which has been finally held by this court in the earlier cause to be null and void and hence no question of its breach arises or can legally arise. Rather, in my opinion, it is founded on a total failure of consideration from the defendant, and the claim is for the recovery of money had and received by the defendant. The right to bring the action is not based on contract but on quasi-contract (see *Chitty* on Contracts (23rd Edition) paragraph 1690). There is no question of the void memorandum of sublease being made the foundation of any right to bring the present action. In my view, the cause of action here arose when the court finally decided that the memorandum of sublease was null and void. For the reasons given, it seems clear that the cause of action in each of the two actions are distinct and not the same, and I so hold.

Certain established principles govern the plea of *res judicata*. The doctrine is clearly explained in the case of *In re May*,[6] where Brett M.R. said (at page 518):

"The doctrine of *res judicata* is not a technical doctrine applicable only to records. It is a very substantial doctrine, and it is one of the most fundamental doctrines of all courts, that there must be an end of litigation, and that the parties have no right of their own accord, after having tried a question between them and obtained a decision of a court, to start that litigation over again on precisely the same questions. Therefore this was a judgment, and, if there was nothing else the existence of the first judgment, would be a bar to the new litigation upon precisely the same point between the parties."

Part of the headnote to the case of *Lee Sem Yoong* v. *Leong Yoong* reads: —

"For the doctrine of *res judicata* to apply, a defendant has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it. Where the former suit between the parties was for the same matter and upon the same cause of action, but the matter directly and substantially in issue was never finally decided, **Held:** the plea of *res judicata* was not available to the defendant."

The oft-quoted dicta of Wigram V.C. in the case of *Henderson* v. *Henderson*[7] states:

"I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction,

the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

This dicta has been applied in various subsequent cases, but I have not been able to find any where it has been applied in which more than one cause of action exists. "Two actions may be brought in respect of the same facts, where these facts give rise to two distinct causes of action" (*per* Brett M.R. in *Brunsden* v. *Humphrey*[8] at page 146). In that case, it was held that damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. Hence, at common law, where there are essentially separate and distinct causes of action, a man who has not in fact obtained judgment on a particular cause of action is not deemed in law to have done so, merely because he has recovered judgment on another cause of action as the result of proceedings in which he might have sued on the first cause of action also. As Bowen L.J., said in the case of *Brunsden* v. *Humphrey, supra,* (at page 151): "There is no positive law... against splitting demands which are essentially separable," although, of course, where the conduct of the plaintiff in splitting two distinct causes of action can be regarded as vexatious and oppressive, the court is always at liberty to exercise its powers of preventing an abuse of its process. Although in *Greenhalgh* v. *Mallard,*[9] Somervell L.J. described the *Brunsden's* case as a border-line case, since one of the three appellate judges dissented, he nevertheless did not question the principle involved when he said (at page 258):

"It is, however, to be observed that in that case there were, so far as I can see, two separate causes of action in the ordinary sense in which the word is used, in that, at any rate, the cases could have been put as trespass to the person and as trespass to goods, and it seems to me that for that reason counsel for the plaintiff cannot successfully put forward that case as covering as a matter of law the circumstances which we have to consider."

In that case, it was held that the plaintiff had only one cause of action in conspiracy, and the plea of *res judicata* applied, or the statement of claim might be struck out on the ground that the action was frivolous and vexatious and an abuse of the process of the court.

I have held that the causes of action in the earlier action and in the present one are distinct and different, and, for the reasons which have been given, there appears to be no bar at common law for the plaintiff to bring the present action. Is the position altered or affected in any way by any written law? There is no substantive law which bars the plaintiff from doing so; and under Order 18, rule 1, the plaintiff is given a choice of bringing more than one cause of action in the same action, but he is not obliged to do so. Hence, the position at common law does not appear to have been altered or affected by any written law. It remains to consider whether, in doing so, the action of the plaintiff is frivolous and vexatious and constitutes an abuse of the process of the court. As has been pointed out, the cause of action in the earlier action was based on the alleged breach of the relevant sublease, and although the same sublease has been pleaded here, it was not so done on the basis that it is a valid and enforceable sublease on which an action may be founded, but because it has been held to be null and void at the end of the earlier action, a position not known before the judgment in that action was delivered. Further, the pleading of the monthly payments to the defendant was not made on the basis that they were rentals, which they cannot be because of the void sublease, but on the basis that they had been paid without any consideration. The issue on this point is therefore not whether any rentals had been paid by the plaintiff to the defendant, but whether they had been paid without consideration, or for a consideration which had failed. It seems clear that the defence pleaded in the present action on this point is different, although in the earlier action, the defendant has delivered no defence and in fact, admitted at the trial that the payments had been received by her as her share of the rentals. Hence, in my opinion, the court in the earlier action was not called upon to adjudicate upon the issue relating to the payments on the same basis as has been raised in this action. In my opinion, having regard to the pleadings in the earlier action, the residual relief, namely, "further or other relief", prayed for in the earlier action has reference to the main reliefs asked for, namely, specific performance or damages in lieu thereof, or both, based on an alleged breach of the relevant sublease, on the assumption that such sublease was valid. It cannot, in the circumstances, have reference to the present cause of action, which is different and which was not raised by the plaintiff in the earlier action. True, the second defendant in the earlier action did raise the question of the validity of the sublease, but in his reply and defence to the counterclaim of the second defendant, the plaintiff, beyond traversing the point, did not go any further. I do not consider that he was obliged to go further, in the circumstances. In this connection, in *Public Trustee* v. *Kenward,*[10] Buckley J. said (at page 1067): —

"The fact that, when an action is brought by A against B, B might in the same proceedings have raised a counterclaim against A relating to quite different cause of action, but does not do so, will not, I think, estop B from pursuing that claim in subsequent litigation."

It seems to me that the same principle is similarly applicable here.

Insofar as the monthly payments are concerned, different legal issues have been raised in the two actions. However, if in respect of liability, the same evidence is required to support the issues of fact in both actions after examining the two sets of pleadings and comparing them, then it would appear that these legal issues are no bar to the giving effect to the plea of estoppel. As Lord Westbury said in the case of *Hunter* v. *Steward*[11] at page 178: "One of the criteria of the identity of two suits, in considering a plea of *res*

*judicata,* is the inquiry whether the same evidence would support both." Having examined and compared the pleadings in both actions, and in view of the issue raised here regarding the monthly payments, I am of the view, and hold, that the evidence required to support this issue is different from that raised in the earlier action. This seems obvious from the defence on the issue here. Accordingly, I am of the opinion that there is no identity of suits here.

Defence counsel has quoted certain passages from Volume 15 (Third Edition) of *Halsbury's* Laws of England regarding the doctrine of *res judicata.* They are, however, concerned with the position where the cause of action in both actions are the same, or are really the same. I have considered the other two local authorities which have been cited by defence counsel, but I consider that they do not detract from the established principle which I have mentioned, that unless the action of the plaintiff in splitting his demands based on two different causes of action is frivolous and vexatious and is an abuse of the process of the court, then he is not debarred from doing so.

In the circumstances of this case, having examined and compared the pleadings in both actions, and having examined and considered the judgment in the earlier action, and for the reasons given, I hold that the objection of the defendant fails. There shall be costs for the plaintiff, to be taxed, in any event, with regard to this objection.

*Objection failed.*

Solicitors: *Yong & Wong; Ting & Co.*

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## MASAM v. SALINA SAROPA & ANOR.

**[A.C.J. (B.T.H. Lee J.) February 4, 1974]**
**[Borneo — Civil Appeal No. K. 7 of 1972]**

*Infants — Guardianship of — Child given into respondents' custody by unmarried mother — Natural mother after marriage claims child — Principles of custody and welfare of child discussed — Guardianship of Infants Ordinance (Sarawak Cap. 93), s. 2.*

The appellant, an unmarried mother, gave her child by one G.S. into the custody of the respondents when the child (born 28.8.70) was 9 days old. The appellant in 1972 was legally married and wished to take the child to Australia with her husband an Australian resident. The respondents resisted the claim. Proceedings were thereupon taken by the appellant but her claim was dismissed. She therefore appealed to the High Court. The lower court was satisfied that the mother had never shown and had never had the slightest interest in the infant apart from giving him some presents. The foster parents had lavished their loving care and affection on the infant.

**Held,** dismissing the appeal: (1) the court below had made findings of fact dependent on its having seen the witnesses and assessed the reliability of their evidence. The appellate court was satisfied that the lower court had exercised its discretion rightly;

(2) the first and paramount consideration was the welfare of the child, to which all other considerations were subordinate. These subordinate considerations include the mother's wishes and the fact that she was the natural mother;

(3) a child's future happiness and sense of security are always important factors and the effect of a change of custody will often be worthy of close and anxious attention, but the fact that change of custody may unsettle the mind of the infant is only a circumstance to be considered and ought not to be regarded as a complete bar to any change.

*Cases referred to:-*

(1) *Re Satpal Singh, An Infant* [1958] M.L.J. 283.
(2) *Re C. (M.A.) (an infant)* [1966] 1 All E.R. 838.
(3) *Thomas John Barnardo* v. *Margaret McHugh* [1891] A.C. 388.

CIVIL APPEAL.

*P. Tan* for the appellant.

*S. Sahathevan* for the respondents.

**B.T.H. Lee J.:** This is an appeal from the decision of the District Court, Kuching, in an application under the Guardianship of Infants Ordinance (Sarawak Cap. 93) made on the 12th September, 1972.

The infant, Izek Frankie Sidhu, born on 28th July, 1970, was the son of one Guruan Singh and the unmarried mother, Masam ak. Johor @ Magdeline ak. Johor, the appellant.

The appellant was employed in three bars — Hongkong Cafe, Tokyo Bar and Palm Grove, the working hours of which were 11 a.m. to 3 p.m. — 7 p.m. to midnight. The infant had from earliest infancy *i.e.* 9 days old lived with the respondents, Salina Saropa and V. Kalimuthu.

On 16th March, 1972, the appellant was legally married to Eddi Neal, an Australian resident, and they now intend to take the infant with them to settle in Australia.

The appellant demanded that her infant should be handed over to her. The respondents having grown fond of the infant resisted the claim and the result was that the present proceedings were taken.

The learned magistrate delivered a full and detailed judgment giving his reasons refusing to make the order sought by the appellant and dismissed the application.

The magistrate's decision was attacked by the appellant on a number of grounds.

The issue throughout these proceedings has been as to the infant's future custody.

I now turn to the law so far as is relevant for the present purposes.

The Guardianship of Infants Ordinance (Sarawak Cap. 93) enacts in section 2 that in matters regarding custody or upbringing of an infant the welfare of the infant should be regarded by the courts as the first and paramount consideration.

This is a statutory provision, and in my judgment section 2 is quite clear, see *Re Satpal Singh, An Infant.*(1) The headnote reads:

"'Welfare' referred to in section 11 (our section 2) of the Guardianship of Infants Ordinance must be taken in the large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child will be happier in one place than in another but his general well-being. The welfare of the child, both moral and physical, should be the paramount consideration in awarding the custody of a child of tender years. The court, in exercising its discretion under the Ordinance, should bear in mind the customs of the parties but should not consider itself bound by them as then it would not be exercising the discretion entrusted to it by the Ordinance."